Goodyear Tire & Rubber Co. *and* **Carl Joseph Cunningham.** Case 7-CA-18422

6 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 28 April 1982 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that employee Carl Joseph Cunningham was engaged in protected concerted activity when he refused to perform a rustproofing assignment on 2 October 1980, and that because his refusal was prompted by his good-faith belief that performing the assignment would subject him to abnormally dangerous working conditions it was also protected by Section 502 of the Act. The judge therefore concluded that the Respondent violated Section 8(a)(1) of the Act by discharging Cunningham for his refusal. We do not agree.

The relevant facts are as follows. Cunningham was employed by the Respondent as a general service employee from 12 April 1978 to 12 May 1979 when he was laid off for economic reasons. On 2 November 1979 he was rehired as a mechanic. His duties as mechanic were varied, including both mechanical and nonmechanical tasks, and prior to 2 October 1980 Cunningham had never refused to perform an assignment. However, on that date, he refused to perform the first rustproofing job he had been assigned and the Respondent discharged him.

The Respondent admitted that this assignment was connected to comments Cunningham had made to two of its supervisors during the few days preceding the assignment. Cunningham told Retail Service Manager Doug Petit, "I'd quit before I'd do a rustproofing because they do not have the right equipment to do it safely." Cunningham based his opinion on his observation of a nearby rustproofing specialty shop. He then listed to Petit the equipment he thought necessary to do the rustproofing safely: goggles, respirators, gloves, eye wash, hats, and overcoats. In the second conversation, Store Manager Joe McClure questioned Cunningham about his conversation with Petit. Cunningham verified to McClure that he had told Petit he would quit before doing a rustproofing job and repeated, "[W]e didn't have all the proper equipment to do rustproofing."

It is undisputed that Cunningham acted alone in refusing the rustproofing assignment. In fact, no evidence was presented that Cunningham had ever spoken to any other employee about the safety of the rustproofing operation although other employees had performed that task. Cunningham admitted that no other employee had ever complained to him about rustproofing and that he had not heard of any complaints about this matter.

In *Meyers Industries*, 268 NLRB 493 (1984), we held that "in general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[2] We thereby overruled those cases which held that the individual assertion of a matter of common concern to other employees constituted protected concerted activity.[3] Here, it is undisputed that Cunningham acted alone about a matter exclusively of his own concern. Indeed, Cunningham admitted that he did not know of any other complaints about the rustproofing operation. Accordingly, for the reasons set forth in *Meyers Industries*, we find that Cunningham's refusal to perform the rustproofing operation does not amount to protected concerted activity.

Furthermore, we do not agree with the judge's determination that Cunningham's refusal to perform the rustproofing assignment was protected by Section 502 of the Act. It is well settled that Section 502 applies only where it has been objectively established that the working conditions are abnormally dangerous.[4] The evidence here does not meet this standard.

The rustproofing liquid, Dacarcote, and the solvent cleanser, Darsol 195, have flash points, respectively, of 120 degrees fahrenheit and 195 degrees fahrenheit. Aside from Cunningham's testimony that the rustproofing liquid emitted an "ethery,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *Meyers Industries* at 497.

[3] See, e.g., *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[4] *True Drilling Co.*, 257 NLRB 426, 429 (1981); *Redwing Carriers*, 130 NLRB 1208, 1209 (1961), enfd. as modified on other grounds 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964). See also *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 385-387 (1974).

painty" and a "gassy, terrible type" smell, the only further evidence of the materials' danger are the labels affixed to the containers.[5] These read:

> CAUTION-COMBUSTIBLE. KEEP AWAY FROM HEAT, SPARKS AND FIRE. KEEP CONTAINER CLOSED. USE WITH ADEQUATE VENTILATION. AVOID PROLONGED BREATHING OF VAPORS. AVOID PROLONGED OR REPEATED CONTACT WITH SKIN.

Further information from the manufacturer stated:

> QUESTION: Is Dacarcote toxic to the respiratory system, skin or eyes? ANSWER: Complete data, which is available on specific request, indicates that the product is not more toxic than most products containing solvents. Reasonable care should be taken to prevent the product from getting into the eyes; and, of course, the product should not be taken internally.

Undisputed testimony shows that the manufacturer's sales representative did not use any special safety or protective equipment when conducting training sessions of the rustproofing operation, but merely rolled up his sleeves. The sales representative, Walter Dellinger, testified that, although he tells his customers that face masks and goggles are available as optional equipment, his recommendation is based on business considerations. He also explained that safety glasses can be substituted for goggles. (Cunningham wore safety glasses.) Dellinger further testified that he would only wear a face mask if he were performing more than one rustproofing job in a row and then only to prevent the discomfort of inhaling too much of the sticky rustproofing spray.[6] Undisputed testimony also shows that the rustproofing liquid can be washed out of eyes with no ill effect and washed off hands with soap and water. McClure testified that he wore a cloth hat when rustproofing and an overcoat, when one was available, but their purpose was merely to keep the sticky material off his hair and clothes. No state certification is required in Michigan to perform the rustproofing, and no other evidence of any local, state, or Federal regulation of the operation was presented. On the basis of the above evidence, we find that the General Counsel has failed to substantiate that the Respondent's rustproofing operation created abnormally dangerous working conditions[7] within the meaning of Section 502 of the Act.[8] We therefore shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

I agree with my colleagues that the refusal of employee Carl Cunningham to perform the rustproofing operation was not protected concerted activity. In my dissenting opinion in *Meyers Industries*,[1] I stated that, although the activity of an individual, under certain circumstances, may be presumed to be concerted, this presumption can be rebutted by a demonstration that an individual acted solely in his own interest. Such is the situation here.

It is undisputed that Cunningham did not act in concert with other employees when he refused to perform the rustproofing operation. There is no evidence that he spoke to other employees about the safety of the operation and Cunningham admitted that no employee had complained to him about the matter. Further, the evidence demonstrates that no other employee had ever been sufficiently concerned about this matter to complain to the Respondent. The Respondent's supervisors, Sullivan and McClure, testified that during their 8 years of service with the Respondent they did not receive or know of any other complaints about the rustproofing operation. Neither is there a required state certification for the rustproofing operation and Cunningham did not allege that the operation violated any local, state, or Federal safety regulations. Instead, Cunningham's concern appears to be based solely on his observation of the rustproofing operation at a different facility. In these circumstances, the Respondent has demonstrated that Cunningham's concern about the rustproofing operation was an individual matter based on his personal observation of that operation, and, thereby, effectively rebutted any presumption that his activity was concerted. On this basis, I concur with my colleagues that Cunningham's refusal to perform the

[5] The judge incorrectly stated that Cunningham had knowledge of these labels before his discharge. No evidence to this effect was presented.

[6] On this point, the record shows that in the 8-month period preceding Cunningham's discharge the Respondent performed only two or three rustproofing jobs.

[7] In making this determination, we do not give any weight to Cunningham's testimony that at a nearby rustproofing specialty shop the employees were equipped with masks, respirators, eye wash, and overcoats. No evidence was presented that the rustproofing operation at that location was identical or similar to the Respondent's or that the equipment was essential to the safety of the rustproofing operation.

[8] In view of this conclusion, we find it unnecessary to determine whether Sec. 502 would have otherwise applied to Cunningham's refusal to work.

[1] 268 NLRB 493 (1984).

rustproofing operation did not amount to protected concerted activity.[2]

[2] See *Comet Fast Freight*, 262 NLRB 430, 430–432 (1982); *Washington Cartage*, 258 NLRB 701, 704 (1981).

I join my colleagues in finding that the evidence fails to substantiate that the Respondent's rustproofing operation created abnormally dangerous working conditions within the meaning of Sec. 502 of the Act.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Midland, Michigan, on January 21, 1982. The proceeding is based upon a charge filed October 23, 1980, by Carl Joseph Cunningham, an individual. The General Counsel's complaint alleges that Goodyear Tire and Rubber Co., of Akron, Ohio, violated Section 8(a)(1) of the National Labor Relations Act by discharging Cunningham because of his protected concerted activity of refusing to perform dangerous work.

Briefs were filed by the General Counsel and the Respondent. Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture, distribution, and sale of tires and related automotive products and services and it has gross annual revenues exceeding $500,000. It maintains a sales and service outlet in Midland, Michigan, and annually receives goods valued in excess of $50,000 from suppliers outside Michigan. It admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Cunningham, the Charging Party, was hired by the Respondent on April 12, 1978, as a general service employee at a rate of $2.35 an hour. He received three raises of 25 cents an hour each on occasions when he obtained Michigan automobile mechanic certificates for passing tests on various automotive specialties.

On May 12, 1979, Cunningham was laid off for economic reasons. Thereafter, he secured employment with an automobile dealer in Midland as a front-end alignment employee at $4 per hour. Cunningham was rehired by the Respondent on November 2, 1979, after the Respondent's service manager, Joe McClure, visited the Charging Party at work and asked him to return to the Respondent, promising that he would be rehired as a full-time mechanic at $5.05 per hour. When the automobile dealer failed to offer an equivalent raise, Cunningham accepted McClure's offer.

At Goodyear, Cunningham performed a variety of tasks, including jobs as a mechanic as well as nonmechanical jobs such as changing tires. He sometimes griped about doing tire work and other jobs when he did not get any commission. However, until October 2, 1980, he never refused to do any job and Service Manager McClure considered that he "usually performed very well as a worker."

On September 22, 1980, McClure was doing a rustproofing job and asked Cunningham to assist him by doing the necessary preparatory work of drilling holes in the automobile's rocker panels. Cunningham, who wears glasses with safety lenses, did not ask for goggles or any other protective gear. He did his task and McClure proceeded with the rustproofing.

Later the same day, just before closing, Cunningham and Retail Service Manager Doug Petit were having a general conversation and the subject of the rustproofing job came up. Cunningham testified that Petit asked him why he did not do it, and Cunningham replied, "[T]here's plenty of mechanical work to do . . . and I wouldn't do a rustproofing anyway, I'd quit before I'd do a rustproofing because they do not have the right equipment to do it safely." Cunningham's belief that the Respondent did not have the necessary safety equipment was based on his observations of his brother performing rustproofing at Tuf-Kote, a rustproofing speciality shop, where the employees had equipment such as goggles, mask, gloves, eye wash, and coats. Further, Cunningham had observed that the rustproof liquid emitted an "ethery, painty" and a "gassy, terrible type" smell.

Petit testified that, when the subject of McClure's rustproofing job came up, Cunningham said that he would "take time off before he will do rustproofing; he does not want to get sticky, does not want to have to be working all day with that sticky mess on him." Petit denied that Cunningham said anything about safety or proper equipment.

Petit told Service Manager McClure that Cunningham would not do rustproofing and a few days later McClure asked Cunningham if he had said he would quit before he would do rustproofing. Cunningham replied that he did and told McClure, "[W]e didn't have all the proper equipment to do rustproofing." Cunningham testified that McClure said, "[W]ell, you could get fired for saying something like that" and McClure testified that he "honestly don't recall" if he made the latter statement.

On October 2, 1980, McClure told Cunningham that there was a rustproofing job for him. Cunningham testified that McClure said, "[W]e saved it especially for you. We're going to give you one alternative. Either you do that rustproofing or you're going to punch out and go home." McClure admitted the conversation but denied that he said the job was especially saved for Cunningham. McClure also added that Cunningham had said the job "took too long and he couldn't make any money and it was a nasty job." McClure was asked whether he and any other member of management had discussed seeing to it that Cunningham was given the next rustproofing job that came in and he replied, "[T]o be perfectly honest, after hearing that I had a man that was

going to refuse some work if it were assigned to him, I fully intended to give him a chance to do a rustproofing job, yes."

Cunningham indicated he would not do the rustproofing and McClure told him to punch out and go home. Cunningham then said he was told he might as well take his tools with him. He asked if he was fired and was told, "[C]all it what ever you want."

There is no Michigan certification requirement for rustproofing of vehicles and Cunningham received no training in the task. Service Manager McClure and Store Manager John Sullivan, as well as employees Mike Arts and Nelson Wagner (both employees of the Respondent's Midland store during 1980), had received training from the Respondent's supplier of rustproofing equipment and materials. Both Arts and McClure had performed rustproofing at the Midland store and were available for work on October 2, 1980.

Dacar Chemical Co. is the Respondent's supplier of rustproof liquid (Dacarcote) and a solvent cleanser (Darsol 195). Caution labels, affixed to the containers of Dacarcote and Darsol 195, state:

> CAUTION-COMBUSTIBLE. KEEP AWAY FROM HEAT, SPARKS AND FIRE. KEEP CONTAINER CLOSED. USE WITH ADEQUATE VENTILATION. AVOID PROLONGED BREATHING OF VAPORS. AVOID PROLONGED OR REPEATED CONTACT WITH SKIN.

Dacarcote has a flash point of 120 degrees fahrenheit, Darsol 195 degrees fahrenheit. The only information which is provided to Dacar sales representatives with respect to the safety of Dacar products is set forth in a question and answer pamphlet which states:

> QUESTION: Is Dacarcote toxic to the respiratory system, skin or eyes?
>
> ANSWER: Complete data, which is available on specific request, indicates that the product is not more toxic than most products containing solvents. Reasonable care should be taken to prevent the product from getting into the eyes; and, of course, the product should not be taken internally.

The Dacar sales representative, Walter Dellinger, was not an expert on safety matters. Dellinger's predecessor had conducted training sessions for Goodyear employees, including McClure and Sullivan. In his demonstration he did not wear a respirator, hat, or goggles, and did not wear a protective coat over his shirt and tie, but simply rolled up his shirt sleeves and performed the entire operation. Although Dacar also sells various equipment, including safety glasses and cloth face masks, none of the protective gear was purchased by Goodyear at any store in which Sullivan worked and the Goodyear employees there did not use respirators, goggles, protective overcoats, or hats while rustproofing customers' cars (although Service Manager McClure might wear an overcoat and did wear a paper hat which he created). Sales representatives are expected to try to sell these protective items to customers. Both Store Manager Sullivan and Service Manager McClure testified that they have not suffered nor did they know of any other employee that may have suffered any injury or effects such as nausea, headaches, or difficulty in breathing from performing rustproofing.

III. DISCUSSION

The issues in this proceeding are whether Carl Joseph Cunningham was terminated for refusing to perform rustproofing work because of his belief that such work was unsafe and whether refusal for such reason constitutes protected concerted activity that would warrant a finding that Cunningham's discharge was an unfair labor practice.

The Respondent also questions whether the original charge or a copy thereof was properly served upon the Respondent. Store Manager Sullivan denied receiving a copy of the charge. However, when Sullivan gave an affidavit to a representative of the Board, he included a comment that "McClure told me this around the time I got this unfair labor practice charge in the mail." Sullivan also stated that, when he gave his affidavit, he was shown the charge and it was read to him. Also, an affidavit of the docket supervisor of Region 7 of the National Labor Relations Board shows that, in the normal course of business, unfair labor practice charges are sent by certified mail to all the respondents, along with an "initial case letter" and other documents. The xerox copy of the initial case letter shows, in the lower left-hand corner, that attached thereto is a certified mail receipt slip which indicates that the charge was sent to the Respondent by certified mail. Under the circumstances, I find that the Respondent was served properly with the original charge and that, otherwise, all parties have had an opportunity to present evidence and argument such that a proper record exists for a decision on the merits of the issues presented.

A. *Reason for Termination*

There is no controversy over the fact that Service Manager McClure discharged Cunningham because of his refusal to do a rustproofing job. The setting for the discharge was deliberately arranged by McCLure after he had heard from Sales Manager Petit that Cunningham had said, on September 22, 1980, that Cunningham would not do rustproofing. Cunningham was told to do rustproofing shortly thereafter on October 2, 1980, despite the fact that he had received no training in the task and despite the fact that other experienced or trained personnel were available to do the assignment. Cunningham testified that he mentioned safety and the lack of proper equipment to both Petit and McClure. However, both deny hearing such a comment and instead testified that Cunningham made remarks about not wanting to work with a sticky mess on him and not wanting to do a long, nasty job on which he could not make money. The testimony given by Store Manager Sullivan tends to attribute some of McClure's comments to Petit and I find an indication that the remarks attributed to Cunningham may be contrived. In any event, they tend to be improbable, especially when it is recognized that Cunningham

was used to working with sticky grease in his duties as a mechanic. It also appears improbable that Cunningham would risk his job over comments related to the cosmetics of working with sticky material. Accordingly, I credit Cunningham's testimony that he mentioned his concern over proper equipment and safety as the reason for not wanting to do rustproofing.

Under these circumstances, I find that the General Counsel has shown that Cunningham's refusal to perform a rustproofing job was based upon Cunningham's belief that it was unsafe to perform without proper safety equipment and that the Respondent knew of his belief. Otherwise, it is shown that Cunningham was considered to be a good employee and it is clear that his discharge would not have taken place in the absence of his refusal to do the rustproofing job.

B. *Nature of the Charging Party Activity*

The alleged unfair labor practice necessarily is related to the Charging Party's having been engaged in protected concerted activity. In *Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (5th Cir. 1981), it recently was affirmed that employee activities are protected when, as a concerted protest, they refuse to work in what they perceive to be unsafe conditions. Thus, it is well established that a charging party's protest over safe working conditions is protected and it can be considered to be concerted activity if, as here, it directly involves the furtherance of a right which inures to the benefit of fellow employees. *Alleluia Cushion Co.*, 221 NLRB 999 (1975). Here, employees Arts and Wagner had performed or were trained to perform rustproofing and thus they were in a position to benefit from Cunningham's activities. Accordingly, Cunningham's conduct cannot be considered to be merely an unprotected unilateral attempt to establish only personal conditions of employment.

Section 502 of the Act specifically gives employees the right to quit labor because of a good-faith belief of abnormally dangerous working conditions. Here, I conclude that Cunningham's awareness of his brother's use of safety equipment when regularly performing the same rustproofing task for another company, combined with his lack of training and his awareness of the warning label on the rustproofing liquid that cautions against use near heat or fire and to avoid prolonged breathing of vapors or prolonged or repeated contact with the skin, is enough to establish that he had a genuine good-faith fear for his safety. *Modern Carpet Industries*, 236 NLRB 1014 (1978). I further find that the Respondent's attempt to show that Cunningham was merely feigning, as an excuse to avoid performance of a "sticky" task, is implausible in view of the Charging Party's normal work activities with grease. I also find that Cunningham's concern over the perceived danger of improper use of rustproofing material is no less real because it might have no immediate effect or because other persons have not shown a concern over either immediate or long-range hazards.

Under these circumstances, and upon a review of the briefs and the entire record, I am persuaded that the General Counsel has shown that Cunningham quit work in good faith because of abnormally dangerous work conditions and, that Cunningham was engaged in protected concerted activity under Section 7 of the Act, and therefore his discharge for engaging in such activity was a violation of Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Carl Joseph Cunningham on October 2, 1980, because he engaged in protected concerted activity for the mutual aid and protection of himself and other employees, the Respondent engaged in an unfair labor practice in violation of Section 8(a)(1).

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that the Respondent be ordered to offer Carl Joseph Cunningham immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that the Respondent be ordered to make Carl Joseph Cunningham whole for the losses which he suffered as a result of his termination in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]